SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 602

J. D. CHALK, Commissioner, Division of Game and Inland Fisheries, Department of Conservation and Development of the State of North Carolina; E. B. KUGLER, Assistant to Commissioner, Division of Game and Inland Fisheries, Department of Conservation and Development of the State of North Carolina; J. A. BRADSHAW, Game and Fish Protector of District No. 1, State of North Carolina; J. H. LONGSHORE, Special Game and Fish Protector of the State of North Carolina; SEAMAN S. WHITTAKER, County Game and Fish Protector of Henderson County, North Carolina; C. N. MEASE, Refuge Supervisor, State of North Carolina,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Harry McMullan,
Attorney General of North Carolina,
Raleigh, N. C.

Lee Overman Gregory,
Assistant Attorney General of North Carolina,
Raleigh, N. C.

J. Y. Jordan, Jr.,
Asheville, N. C.

J. M. Horner, Jr.,
Asheville, N. C.

Peyton Randolph Harris,
Two Wall Street, New York, N. Y.,
Counsel for Petitioners.

INDEX.

CITATIONS.

Table of cases cited:

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 602

J. D. CHALK, COMMISSIONER, DIVISION OF GAME AND INLAND FISHERIES, DEPARTMENT OF CONSERVATION AND DEVELOPMENT OF THE STATE OF NORTH CAROLINA, ET ALS.,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of J. D. Chalk, Commissioner, Division of Game and Inland Fisheries, Department of Conservation and Development of the State of North Carolina; E. B. Kugler, Assistant to Commissioner, Division of Game and Inland Fisheries, Department of Conservation and Development of the State of North Carolina; J. A. Bradshaw, Game and Fish Protector of District No. 1, State of North Carolina; J. H. Longshore, Special Game and Fish Protector of the State of North Carolina; Seaman S. Whittaker, County Game and Fish Protector of Henderson County,

North Carolina; and C. N. Mease, Refuge Supervisor, State of North Carolina, respectfully shows to this Honorable Court:

A. Summary Statement of Matter Involved.

1. Decree Below.

By this petition the defendant officials of the State of North Carolina seek a review of the decision of the United States Circuit Court of Appeals for the Fourth Circuit rendered August 30, 1940, which affirmed the decree of the District Court forever enjoining the officials of the State of North Carolina from enforcing the laws of that State with respect to deer having their habitat upon the Pisgah National Game Preserve in western North Carolina.

The decision of the United States Circuit Court of Appeals for the Fourth Circuit is reported in 114 Federal 2d. 207, and appears on page 311 of the Record.

2. Pleadings.

This suit was begun by the United States on March 13, 1939, by the filing of a complaint in the District Court of the United States for the Eastern District of North Carolina (R. 1). The defendants, petitioners herein were the Game Commissioner of North Carolina, and game officials under him.

The complaint alleged (R. 3, Pgh. III) that North Carolina had, by Ch. 17, North Carolina Public Laws of 1901, consented to the acquisition by the United States of such lands in North Carolina as in the opinion of the Federal Government might be needed for the establishment of a national forest reserve, and to the making of civil and criminal laws for the management and protection thereof; and that (R. 3, Pgh. IV) the lands had been acquired under the Weeks Act of March 1, 1911, Ch. 186, 36 Stat. 961. It al-

leged that by the Act of Congress of August 11, 1916, 39 Stat. 476, and by Presidential Proclamation (R. 3, Pgh. VI), a part of the Pisgah National Forest had been set aside as the Pisgah National Game Preserve. It also alleged (R. 3, Pgh. VII) that by Ch. 205, North Carolina Public Laws of 1915, the General Assembly of North Carolina had consented that Congress might make or authorize all such rules and regulations as the Federal Government should determine to be needful in respect to the game on said lands, and that (R. 4, Pgh. VIII) certain Acts of Congress authorized the Secretary of Agriculture to make such rules and regulations as would insure the protection of the forest from damage, and would protect the game on said land.

The complaint further alleged (R. 5, Pgh. XI) that said lands were being severely damaged by the deer thereon.

The purpose of the suit was to permanently enjoin defendants from enforcing the State game laws with respect to said deer against officers and employees of the United States Forest Service, and others hunting or killing deer under authority of the Secretary of Agriculture, the plaintiff claiming that it had the right to reduce the number of deer ranging or found on the Preserve, regardless of State laws (R. 12, 13).

Plaintiff also prayed (R. 13) for judgment declaring the State game laws to be violative of Article IV, Section 3, Clause 2, of the United States Constitution, insofar as applied to said deer, and for a declaration that the United States has sole and exclusive jurisdiction over the deer on said Preserve.

After the suit was begun, and on September 9, 1939, (R. 86, 267, 268) the Secretary of Agriculture issued his "Determination and Authorization" in which he found that the Preserve was being seriously damaged by the deer, and authorized the United States Forest Service and hunters

operating under his general regulations published August 15, 1936, to hunt and kill deer on the Preserve from October 1, 1939, to February 1, 1940. (Under State law the deer season ended December 31, 1939.)

The Secretary also authorized his employees to trap, capture and ship live deer off the Preserve at any time during the balance of the year 1939 and the year 1940. (Such acts are prohibited by State law without a permit from the Game Commissioner of North Carolina.)

By agreement of Counsel, the plaintiff was permitted to file an amended complaint on October 5, 1939, without prejudice. It differed from the original only in that it alleged the making and issuing of the Secretary's "Determination and Authorization" (R. 32, 43, 50).

The defendants' answer to the amended complaint denied that the Preserve was being seriously damaged by the deer (R. 53, Pgh. 11) and alleged that the effect of the browsing of the deer on the Preserve was inconsequential and not appreciable (R. Mid. 59).

They averred that repeated Acts of Congress require the United States Forest Service to cooperate with State game officials in the enforcement within the national forests of State game laws, and that the Federal employees assigned to duty on the Pisgah had failed and refused to cooperate with the game officials of the State of North Carolina, and had ignored and violated State game laws (R. Mid. 54).

The answer alleged that in consenting to the acquisition by the United States of lands in the western portion of North Carolina for forest reserves, the State of North Carolina retained its concurrent civil and criminal jurisdiction over said lands, as appears from Ch. 17 of the Public Laws of North Carolina, Session of 1901 (Appendix, uu. 26-27) and that the game laws of North Carolina are in full force and effect over said lands (R. 59-60).

The answer also alleged that the United States did not have exclusive jurisdiction over said lands (R. 60, Fourth), and denied that Ch. 205, North Carolina Public Laws of 1915 (Appendix, pp. 27-28) granted to the United States an exclusive jurisdiction over the game on the lands in the Pisgah National Forest, pointing out that in 1933 and in 1939 the General Assembly of North Carolina had construed its said Act of 1915 and had enacted and declared that nothing in said Act of 1915 should be taken to abrogate the vested right of the State of North Carolina to collect hunting license fees from persons hunting upon said lands, and that said Act of 1915 should not be taken as conveying the State's ownership of the wild life thereon or permitting the hunting thereof except in accordance with the general game laws of said State (R. 60, Fifth).

As to the "Determination and Authorization" of the Secretary of Agriculture, dated September 9, 1939, the answer of the defendants pointed out that this paper was not authorized by any Act of Congress, nor was it a "general" rule or regulation within the Act of August 11, 1916, Ch. 313, 39 Stat. 476, Title 16, U. S. Code, Sec. 683, (Appendix, p. 35) and that said "Determination and Authorization" was contrary to the facts and circumstances existing during the times referred to therein, and was not binding upon the defendants.

Upon the issues so framed, the cause proceeded to trial before District Judge Meekins and a jury on November 6, 7 and 8, 1939.

3. Brief Outline of the Evidence.

The Pisgah National Game Preserve consists of about 97,000 acres of rugged, mountainous land in Western North Carolina (R. 118). It is a part of the 150,000 acre Pisgah National Forest (R. 97, 118).

The deer on the Pisgah are locally migratory, and range on and off the Pisgah, their ordinary range being about 25 miles (R. 113, 135, 155, 156). The vegetation on the Preserve and Forest is very dense and thick, it being the luxuriant second growth of the Southern Appalachians (R. 147, 177, 215, 216, 217, 218, 220, 221).

Upon the issue whether the forest was being seriously damaged by the deer, the testimony was unanimous that during recent years there has been a marked decrease of the number of the deer on the Pisgah. The Government's witness, Ruff, estimated that in 1935 there were about 7100 or 7200 deer on the Preserve (R., top 125), and that at the time of the trial the number was over 5,000, a decrease of approximately 30%, and that this number would annually produce about 1250 surviving young (R. 125).

For three years, 1936, 1937 and 1938, the United States held public hunts on the Preserve (R. 83, 84; 139-143). These hunts were held in accordance with State law (R. 138-141) and extended over a period of only four weeks (R. 38-41). The State open season for deer was October 1 to January 1 (R. 143). On these hunts the United States allowed each hunter to take only one deer (R. 142). State law allowed each hunter three deer a season (R.142). Notwithstanding the natural increase and the Federal restrictions in addition to those imposed by State law, these three hunts and the trapping operations reduced the deer to an estimated number of 5,000.

The Government employee Rachford testified (R. 105) that the deer were "badly" damaging the Preserve. He had little acquaintance with the Preserve (R. 110-115). Like testimony was given by the Government employee Ruff (R. 118-122, 251-257). Ruff's testimony was based largely on six "study plots," (R. 119-120) each about 3 acres in extent (R. 127). These plots were in or adjacent to open

field areas typical of only two per cent of the Preserve, where deer naturally tend to concentrate (R. 181-182, 198-199).

Twelve witnesses for the State, well acquainted with the Preserve for many years, testified that the deer were not damaging the Preserve (R. 145-222). Like testimony was given by two able and trained forestry experts, familiar with the Preserve, whose character, ability, and qualifications were not questioned (E. L. Meadows, R. 178-186; Ross O. Stevens, R. 195-202). Meadows testified (R. 188) that the Preserve would support "two or three" times as many deer as were on the Preserve at the time of the trial, and Stevens testified (R. 199) that it would support "a much larger" number of deer without damage.

After the close of all the evidence, the District Judge, being of opinion that the case was not one for a jury, dismissed the jury, and subsequently signed Findings of Fact, without rendering any opinion (R. 267).

There was no evidence that, and neither the Secretary of Agriculture nor the District Judge found that the deer on the Preserve could not be reduced by means and within the times allowed by State law.

The District Judge refused to permit the defendant Chalk to relate his efforts to cooperate with the Federal Forest Service in the handling of deer on the Preserve (R. 138) but he was allowed to testify that in 1937, at the request of the Forest Service, the State Board, of which he was Chairman, promulgated a regulation whereby doe deer might be taken in the hunts on the Preserve, a regulation still in effect (R. 139). Elsewhere in North Carolina it is unlawful to take doe deer.

The State game laws, summarized in the Appendix, authorize the State game officials to permit the killing or trapping of deer damaging land or the growth thereon. The

United States offered no evidence that it had ever applied for or been refused such a permit, nor did it show that it had ever requested the cooperation or aid of the State in reducing the deer on the Preserve.

The amended complaint shows (R. 41) that since 1927 the United States has trapped and shipped 2,400 deer out of North Carolina. The defendant Chalk testified (R. 142-143) that, generally, there were few deer on the Federal lands in Western North Carolina, and that he had requested that other Federal lands in the State be stocked before any deer on the Pisgah Preserve should be taken out of the State. It was alleged by the United States (R. 43, Paragraph 17) and admitted by defendants (R. 57, Paragraph 17) and the Court found (R. 70, Paragraph 12) that the deer were worth $25.00 each.

4. Findings and Conclusions of District Judge.

The District Judge found (R. 67, Finding 2) that the Preserve was being "severely damaged" by the deer, and (R. 68, Findings 3 and 4) that the Determination of the Secretary of Agriculture to that effect was sustained by the evidence.

He further found (R. 69, Finding 8) that petitioners had threatened and were threatening to enforce the State game laws against the members of the United States Forest Service and hunters authorized by the Secretary of Agriculture to hunt and kill said deer.

He concluded (R. 70, Concls. 1 and 2) that the United States, under regulations of the Secretary of Agriculture, was entitled to reduce the deer on the Preserve by authorizing Federal employees or others to hunt and kill said deer and to remove their carcasses, and that Federal employees could trap, capture, and transport or ship live deer, all "without regard to State game laws and without interference from defendants."

5. Decree and Injunction.

The District Judge thereupon (R. 72-3) permanently enjoined the defendants and all persons acting under their authority from enforcing or attempting or threatening to enforce the State game law against, and from arresting or prosecuting or attempting or causing the arrest or prosecution of any of the officers, agents or employees of the United States or any other person, on account of any act done or which may be done under the authority of and in executing the rules and regulations of the Secretary of Agriculture for reducing the number of deer on said Preserve.

The District Court also decreed that (R. 73, Pgh. 4) as applied to said deer, the State game laws "are violative of Clause 2, Section 3, Article IV of the Constitution of the United States," and the laws and regulations thereunder, and further decreed that (R. 73, Pgh. 5) the United States has "sole and exclusive jurisdiction over" said deer.

6. Rulings of Circuit Court of Appeals.

The defendants appealed to the Circuit Court of Appeals for the Fourth Circuit (R. 74), which affirmed the finding of the District Judge that the deer were "severely damaging" the Preserve (R. 316), and held that *Hunt* v. *United States*, 278 U. S. 96, controlled this case, and that under it the United States had the right to reduce the number of deer without regard to State laws (R. 317-318).

The Circuit Court of Appeals further held (R. 317) that Ch. 205, North Carolina Public Laws of 1915, "ceded exclusive jurisdiction over the control of wild life in the Pisgah Game Preserve to the Federal Government," and that the Act of August 11, 1916, Ch. 313, Section 1, 39 Stat. 446, 476, T. 16, U. S. Code, Section 683, authorizing the establishment of game preserves in national forests acquired

under the Weeks Act was an acceptance thereof (R. 314-315), and that such acceptance was shown by the debate in the Senate on the Act of 1916. It held that after such cession "the State could not, by the passage of any general game law, in any way affect the right of the plaintiff under the cession" (R. 317).

Upon these grounds, it stated that the granting of the permanent injunction was correct (R. 318).

The State Act of 1915 affects not only the Preserve but all the lands in Western North Carolina acquired by the United States under the Weeks Act, of which the entire 150,000 acres in the Pisgah National Forest is merely a part.

The decision of the Circuit Court of Appeals is, therefore, that the State of North Carolina has no jurisdiction over the game on any of the extensive national forests in the western portion of that State.

B. Statutes Involved.

The statutes involved are set forth or summarized in the Appendix, and it is believed that the relation of the principal State and Federal statutes herein involved are adequately indicated in Question I, *infra.*

C. Jurisdictional Statement.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 938, T. 28, U. S. Code, Sec. 347 (a).

The decree of the Circuit Court of Appeals was entered August 30, 1940 (R. 318). This petition was filed November 30, 1940.

In *Dodge* v. *Woolsey,* 59 U. S. (18 How.) 331, 358, this Court, with respect to its jurisdiction to adjudicate and

decide questions of power between the States and the Nation, said:

> "A supreme tribunal has been provided which has hitherto, by its decisions, settled all differences which have arisen between the authorities of the States and those of the United States."

And in *Texas* v. *White*, 74 U. S. (7 Wall.) 700, 725, the Court said that "the preservation of the States, and the maintenance of their Governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government," a statement often repeated in the later decisions of the Court.

Certiorari was granted in *Pennsylvania v. Williams*, 294 U. S. 176, "to resolve questions of public importance growing out of the rival claims of" State and Federal authorities.

The traditional and only final and effective settlement of disputes between the States and the Nation with respect to power and jurisdiction over the National Forests and other Federal areas is by the decision of this Court. Recent instances in which this Court has noted and exercised its jurisdiction in such cases are:

Superior Bath House Co. v. *McCarroll*, No. 180, Oct. Term, 1940, probable jurisdiction noted October 14, 1940, 61 S. Ct. 23;

Buckstaff Bath House Co. v. *McKinley*, 308 U. S. 358, 361;

Bowen v. *Johnston*, 306 U. S. 19;

Collins v. *Yosemite Park and Curry Co.*, 304 U. S. 518;

Rainier Nat. Park Co. v. *Martin*, 302 U. S. 661;

Silas Mason Co. v. *Tax Comm. of Washington*, 302 U. S. 186;

James v. *Dravo Cont. Co.*, 302 U. S. 134.

This Court has jurisdiction to examine evidence, and will reverse the findings of the District Court, though concurred in by the Circuit Court of Appeals, where only a "flimsy showing" of the existence of the facts found is made, if the case is distinguished by a general importance warranting reexamination by the Supreme Court to determine the quality and quantity of evidence which should be required for a particular important purpose. *Beyer* v. *Le Fevre*, 186 U. S. 114, 119. There, the question was how much evidence should lawfully be required to set aside a will. Here, the question is how much evidence of real damage to the forests should be required by the courts before approving the act of the Forest Service in setting State jurisdiction at naught.

In *United States* v. *McGowan*, 290 U. S. 592, certiorari was granted with respect to a dispute between the State of Washington and a tribe of Indians as to the latter's fishing rights, where the case turned entirely on an appreciation of the evidence and the findings of the District Court had been affirmed by the Circuit Court of Appeals. Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, page 608, note 81.

D. Questions Presented.

The questions presented by this petition are:

I

The State of North Carolina consented that the United States might acquire lands in its Western portion to establish forest reserves, but reserved to itself a concurrent civil and criminal jurisdiction over such lands (N. C. Public Laws, 1901, Chapter 17). A prior Act of Congress preserved the jurisdiction of the States, both civil and criminal, over lands within their borders comprising the public forest reserves (30 Stat. 34, 36, 16 U. S. Code, Sec. 480). The lands in question were acquired by the United States

for a national forest under the Weeks Act (36 Stat. 961) which expressly preserved the jurisdiction of the State (36 Stat. 963, 16 U. S. Code, Section 480). Acts of Congress prior and subsequent to 1901 provided that Federal forest officials should cooperate with State game officials in enforcing State game laws in national forests (30 Stat. 1074, 1095, 34 Stat. 1256, 1269; 35 Stat. 251, 259, 16 U. S. Code, Sec. 553). In 1915 the State of North Carolina consented (North Carolina Public Laws of 1915, Chapter 205) that Congress might make or authorize "all such rules and regulations as the Federal Government shall determine to be needful in respect to" the game on North Carolina lands acquired by the United States under the Weeks Act, the act of consent not providing that such power should be exclusive. In 1916 (39 Stat. 446, 476, 16 U. S. Code, Section 683) Congress authorized the establishment of game preserves on lands acquired under the Weeks Act, and the Pisgah National Game Preserve was established thereunder on the North Carolina lands above referred to. Under such circumstances, did the State Act of 1915 grant to the United States an exclusive jurisdiction over the deer on said lands?

II.

Under such circumstances, if the State Act of 1915 be construed to grant such exclusive jurisdiction, was such jurisdiction accepted by the United States, there being no repeal of any of the Acts of Congress referred to in Question I?

III

The State and Federal laws referred to above in Question I being in force, in 1933 the General Assembly of North Carolina enacted and declared that its said Act of 1915 should not be "construed to abrogate the vested rights of the State of North Carolina" to collect fees for licenses for hunting and fishing on said lands (N. C. Laws of 1933,

Chapter 537, Section 2); and in 1939 it enacted and declared (N. C. Public Laws of 1939, Chapter 79) that the State Act of 1915 should not be construed to convey the State's ownership of the wild life on said lands, or to permit the hunting, trapping, or transporting thereof, except in accordance with the State Game Law (N. C. Public Laws of 1935, Chapter 486). Should such legislative constructions of the Act of 1915 be rejected, particularly in view of the Acts of Congress referred to in Question I?

IV.

Was the Circuit Court of Appeals clearly wrong in affirming the finding of the District Judge that the Preserve was being severely damaged by the deer thereon?

V.

If not, the State and Federal laws above referred to being in force, and there being neither evidence nor finding of an emergency, whether the Circuit Court of Appeals erred in affirming the permanent injunction against defendants, petitioners herein, when it was not shown that the State game laws prevented or would prevent or seriously interfere with the desired reduction of the deer, or that the United States Forest Service had fairly and reasonably endeavored to reduce the number of deer on said Preserve by means and within the time allowed by the laws of North Carolina, or through cooperation with the State Game Officials?

VI.

Whether the United States Forest Service has the right or power, over the objections of State Game Officials, to ship or transport captured live deer from said Preserve to other States on the ground that said deer were damaging the Preserve, in the absence of proof that they could not

readily be removed from said Preserve and turned over to said game officials to stock other remote areas in the State.

E. Reasons for Granting the Writ.

I.

In holding (R. 317) that North Carolina Public laws of 1915, Chapter 205 (Appendix, pp. 27-28), ceded to the United States an exclusive jurisdiction over the game on the Federal lands in Western North Carolina acquired under the Weeks Act, the Circuit Court of Appeals has decided an important question of jurisdiction and power between the State and the Nation. The consent to the making of rules and regulations in respect to game which the State gave by Chapter 205 did not purport to be and was not in terms a grant of exclusive jurisdiction; but by implication the Circuit Court of Appeals has inserted into the law the words "cedes exclusive jurisdiction", contrary to the canon of construction "that the rights of sovereignty are never to be taken away by implication," *Re Kelly,* 71 Fed. 545, 552, a canon apparently approved in *Fort Leavenworth Ry. Co.* v. *Lowe,* 114 U. S. 525, 538.

The State and Federal laws referred to in Question I, *supra,* set forth in the Appendix, preserve the jurisdiction of the State over the lands in question. The Acts of Congress there referred to show that for over forty years it has been and is now the settled policy of the United States to preserve State jurisdiction in the national forests, both civil and criminal. These State and Federal laws are *in pari materia* with Chapter 205, which should not be given a construction that would deprive the State of any part of the jurisdiction thus preserved, particularly when such construction is unnecessary, and is reached by reading the words "cedes exclusive jurisdiction" into the enactment of 1915. Chapter 205 has not been construed by any other

judicial decision, and the important question of its meaning and effect should be settled by this Court. The cases showing the jurisdiction and special function of this Court to decide such issues are cited in the Jurisdictional Statement, *supra.*

II.

If Chapter 205, North Carolina Public Laws of 1915, be construed to cede such exclusive jurisdiction, it is believed that the Circuit Court of Appeals erred in holding that the Act of August 11, 1916, Chapter 313, Section 1, 39 Stat. 446, 476, 16 U. S. Code, Section 683 (R. 314-315), constituted an acceptance of an *exclusive* jurisdiction. That Act simply authorized the President to set aside game preserves on lands acquired by the United States under the Weeks Act, and forbade hunting in such preserves except under "general" rules and regulations of the Secretary of Agriculture. The Act of 1916 is not believed sufficient to support the conclusion that Congress thereby abandoned its forty year policy to preserve State jurisdiction in the National Forests and to require Federal Forest Officials to cooperate and aid in the enforcement of State game laws.

The Circuit Court of Appeals also erred in holding that the debate (R. 315) in the Senate on the passage of the Act of August 11, 1916, showed acceptance of a grant of *exclusive* jurisdiction. True, it shows an acceptance of the State Act of 1915; but not a word of the debate shows that it was thought that the Act ceded, or that the United States intended to accept, an *exclusive* jurisdiction over game on the lands in this State. The debate shows that Senator Overman, the author of the Amendment, drew it originally to apply only to the Pisgah National Game Preserve, and that the Agricultural Committee broadened it to include all of the lands acquired under the Weeks Act, including lands in "Virginia, Georgia, Tennessee, and New Hampshire and the White Mountains" (Appendix, pp. 37-

38). The debate does not show that in 1916 the other States mentioned had enacted laws similar to the North Carolina Act referred to. The Act of August 11, 1916 was a general enactment, and did not depend upon the State Act of 1915. The debate nowhere shows an intention to disturb or depart from the settled policy of Congress referred to above. The meaning and effect of these State and Federal statutes is a matter of importance to this State and to the nation, and to all other States in whose borders are located national forests acquired under the Weeks Act, and should be settled by the decision of this Court.

III.

In 1933 (N. C. Public Laws, 1933, Chapter 537, Section 2, Appendix, p. 29) the General Assembly of North Carolina enacted that the State Act of 1915 should not be construed to deprive the State of its *vested* right to collect, under general laws applicable to the whole State, license fees from hunters on the lands affected by the Act of 1915; and in 1939 (N. C. Public Laws, 1939, Ch. 79, Appendix, pp. 30-31) the General Assembly of the State enacted that its Act of 1915 should not be construed to convey the State's ownership of the game on said lands or to permit hunting, trapping, or transporting the game thereon, except in accordance with the game laws of North Carolina.

This legislative construction should be accepted. Under somewhat similar circumstances, this Court accepted a like construction by the Supreme Court of Washington in *Silas Mason Company* v. *Tax Commission of Washington*, 302 U. S. 186, 206, and in this respect the decision below is probably in conflict with that decision. The construction of the General Assembly is in accordance with the settled policy of Congress, above referred to, and is supported by the State and Federal laws, referred to in Question I, *supra*, preserving the jurisdiction of this State over North Carolina lands acquired under the Weeks Act. The decision of

the Circuit Court of Appeals is in conflict with the construction of the General Assembly of North Carolina and the question presented is of importance to the State and to the nation and should be settled by this Court.

IV.

The question whether the Circuit Court of Appeals was clearly wrong in affirming the finding of the District Judge that the deer were severely damaging the Preserve is one of great importance to the State of North Carolina. It believes that the evidence clearly shows that the Preserve had not been and was not likely to be appreciably damaged by the deer. The question is also of great importance to every State in the Union. On the average the United States owns 20.74% of the lands in the States, its ownership ranging from 82.67% in Nevada to 0.1% in Iowa. House Document No. 111, 76th Congress, First Session, entitled, "Federal Ownership of Real Estate and its Bearing on State and Local Taxation."

In *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 147, and in *Silas Mason Co.* v. *Tax Comm. of Washington*, 302 U. S. 186, 208, this Court referred to the increasing importance of preserving State jurisdiction "as the activities of the Government expand and large areas within the States are acquired." If the highly theoretical and imaginative evidence given by two Forest Service employees in this case is to be deemed sufficient to establish "severe damage," the Forest Service can seize and retain jurisdiction of the wild life on every acre of its lands in States where deer or other game animals have their habitat. The highly important question of the quantum and quality of evidence to be required before the Forest Service may be permitted to deprive the States of their jurisdiction should be settled by the decision of this Court.

V.

There was neither evidence nor finding of an emergency requiring the prompt removal of the deer, nor that the State Game laws would prevent or seriously interfere with the reduction of the number of deer desired by the Forest Service. There was no evidence or finding that the officials of the Forest Service had endeavored to make such reduction by means and within the time allowed by State law, or that the Forest Service had made any attempt to secure the aid and cooperation of State game officials in making such reduction. The District Judge refused (R. 136) to permit the State Game Commissioner to relate his efforts to cooperate with the Forest Service officials in the handling of the deer on the Preserve. Whether, under such circumstances, State game officials should be permanently enjoined from enforcing State game laws is an important question that this Court should decide.

VI.

The game in this country is the property of the States, *Geer* v. *Connecticut*, 161 U. S. 519, 528, even where it is on Federal lands, *Ward* v. *Race Horse*, 163 U. S. 504. There was neither evidence nor finding that it was necessary for the Forest Service to ship to other States live deer captured on the Pisgah National Game Preserve, nor that they could not readily be turned over to State game officials when captured by the Forest Service. The 2,400 live deer shipped out of this State by the Forest Service since 1927, without the State's consent, were worth $60,000.00. The Forest Service contends that of the 5,000 which it estimates are on the Preserve, 3,500 should be removed. If shipped to other States, this would deprive North Carolina of prop-

erty worth $87,500. It is a matter of importance to the State that it not be deprived of its game, which freely ranges on and off the Federal lands in question; and whether, under the circumstances of this case, the Forest Service can convert to their own use live deer belonging to North Carolina by shipping them to other States is a question that should be decided by this Court.

VII.

The Circuit Court of Appeals held, as one of its grounds of decision, that *Hunt* v. *United States,* 278 U. S. 96, was "controlling" (R. 316).

In the *Hunt* case, Arizona officials were enjoined from arresting or prosecuting United States forest officials or employees for killing mule deer under an order made by the Secretary of Agriculture for the protection of the Kaibab National Forest and the game preserve coterminous with it from the destructive effects of overbrowsing by the animals. The damage was serious and extensive. It was recognized by both State and Federal officials and both had made unsuccessful efforts to cope with the threatened disaster, admitted by all.

Upon the facts, we point out that in the *Hunt* case:

(1) The area involved about 349,760 arid acres, from 5,000 to 9,000 feet in elevation, with only sparse growth, whereas the Pisgah is well watered and has a lush and often almost impenetrable growth. (Government's Exhibit 3, R. 271; Cogburn, R. 177.)

(2) The mule deer, numbering about 26,000, were very large animals with great appetites, ranging in herds, whereas the white-tail deer are small, eat comparatively

little, and do not range in herds. The mule deer on the Kaibab were poor and starving, the deer in this case fat and well-nourished (R. 155, 161, 167, 189, 204, 207, 212).

(3) On the Kaibab there was about one deer to every thirteen acres, on the Pisgah about one deer for every thirty acres (R. 123).

(4) On the Kaibab the topography was such that the deer never left its bounds, whereas in the Pisgah the deer roam at will on and off the Preserve and Forest for distances as great as thirty or forty miles (R. 135, 136, 161, 184).

(5) On the Kaibab the admitted damage was so great that the sparse forest growth was imminently threatened with total destruction, whereas on the Pisgah the evidence is overwhelming that the deer have not caused, and are not threatening to cause, any appreciable damage. In all the history of the Southern Appalachians, there has never been an instance of forest damage by deer.

In *Beyer* v. *LeFevre,* 186 U. S. 114, 119, this Court referred to the rule that findings concurred in by two courts would ordinarily be accepted, but said that "there has always been recognized the right and the duty of this Court to examine the record, and if it finds that the conclusions are wholly unwarranted by the testimony, it will set the report or verdict aside and direct a re-examination. And after having carefully examined the record in this case, we are constrained to the conclusion that there is no testimony which justified the answer returned to the second question. On the contrary, if a will is set aside upon such a flimsy showing as was made of undue influence, few wills can hope to stand."

So, here, if State sovereignty can be "set aside upon such a flimsy showing" of damage as was presented in this case, the United States Forest Service can assume jurisdiction in every national forest in the country having big game, notwithstanding the long established policy of Congress to preserve State game jurisdiction in such areas.

At the trial of this case, counsel for the Government (R. 266) argued that the Determination of the Secretary of Agriculture was conclusive of the question of damage and bound both the Court and the defendants. Thereupon, being impressed by the Secretary's finding and the Government's argument as to its effect, the District Judge reversed (R. 267) his earlier ruling excluding the Determination from evidence, and found (R. 68) that the Secretary's Determination of damage was sustained by the testimony of a "host of witnesses."

The only testimony of substantial damage was given by two employees of the Forest Service. Twelve other witnesses testified that the deer had inflicted no appreciable damage to the Preserve. A large number of disinterested witnesses, familiar with the area for many years, testified to the absence of any appreciable damage; and two of the State's witnesses so testifying were able and trained forestry experts, familiar with the Preserve, whose character, ability, and qualifications were not questioned.

The *Hunt* case is not controlling for the further reason that the Arizona Enabling Act, 36 Stat. 557, 569, contained a provision that the people of Arizona "disclaim all right and title to the unappropriated and ungranted public lands", and reserved (573) to the United States the national forests in Arizona. When Arizona was admitted to the Union, the Kaibab was an established National Game Preserve, over which the United States had and retained

exclusive jurisdiction, 27 Stat. 1064; 34 Stat. 607; 34 Stat. 3263; 35 Stat. 2192. See, also, 36 Stat. 2496, and 40 Stat. 1175.

In the instant case, the Pisgah was acquired under the Weeks Act, and the jurisdiction of the State over the land and game was preserved by the Federal and State enactments above referred to.

In the *Hunt* case the necessity of reducing the deer was admitted. It was also agreed that trapping, hunting and driving the deer had been tried without success. Killing on a large scale was immediately imperative and the only possible mode of reduction. On the Pisgah, trapping and removal is feasible. The United States alleges (R. 41, Paragraph XVI) that it has trapped and shipped to other States 2,400 of the Pisgah deer. The State Game Commissioner testified that (R. 141-143) he objected to the shipment of Pisgah deer to other States, and that what he desired was that any deer captured on the Pisgah should be used to populate or repopulate other areas in the State. The State has not demanded and does not demand that the Forest Service make no reduction in the number of deer on the Pisgah. It has pointed out and contended that if, during 1936 to 1938, inclusive, the Forest Service has not greatly restricted the Pisgah hunting to one-third of the season limit and one-third of the bag limit of State law, it could have reduced the deer by 5,000 or 6,000 instead of by 2,000. It has not objected to the trapping and removal of deer by the Forest Service, provided the deer be not removed to other States so long as they are required to stock underpopulated areas in North Carolina. Indeed, the State has offered and offers to assist in such trapping and removal, at its own expense, if that be acceptable to the Forest service.

In view of these facts, and of the State's undoubted ownership of the deer (*Geer* v. *Connecticut,* 161 U. S. 519,

528; *Ward* v. *Race Horse,* 163 U. S. 504, 507, 514) surel
this is not a proper case for a permanent injunction again
the defendants, but rather one for the application of th
Acts of Congress, set forth in the Appendix, requiring th
Forest Service to aid and cooperate with State game official
in the enforcement of the game laws of the State. At leas
under the facts of this case, the courts should, before issu
ing such an injunction, require the Forest Service to sho
not only an immediate emergency, but also that reasonabl
efforts have been made to secure the cooperation of th
State game officials, and that such cooperation was denie
The courts should also require the Forest Service to sho
the necessity of shipping North Carolina deer to othe
States, and if such proof be not made, should at least recog
nize the property of the State in the deer by providing tha
any live deer trapped on the Preserve by the Forest Servic
should be turned over to the State game officials and no
shipped to other States. The *Hunt* case clearly does no
hold otherwise. The Circuit Court of Appeals has mis
applied and greatly extended the effects of that case; it ha
applied it to a vastly different state of facts, and it is
matter of great importance to North Carolina, and to ever
game State in the Union, to know whether the holding i
applicable to the facts appearing in this case.

Wherefore, your petitioners respectfully pray that a wri
of certiorari be issued out of and under the Seal of thi
Honorable Court, directed to the United States Circui
Court of Appeals for the Fourth Circuit, commanding tha
court to certify and to send to this Court for its revie
and determination, on a day certain to be named therein,
full and complete transcript of the record and all proceed
ings in the case numbered and entitled on its docket, No
4627, "J. D. Chalk, Commissioner of Game and Inland Fish
eries, et als., Appellants, vs. United States of America, Ap
pellee," and that the said decree of said court may be re

versed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated November 23, 1940.

HARRY MCMULLAN,
Attorney General of North Carolina,
Raleigh, N. C.
LEE OVERMAN GREGORY,
Assistant Attorney General of North Carolina,
Raleigh, N. C.
J. Y. JORDAN, JR.,
Asheville, N. C.
J. M. HORNER, JR.,
Asheville, N. C.
PEYTON RANDOLPH HARRIS,
Two Wall Street, New York, N. Y.,
Counsel for Petitioners.